89-134 (1)

NO. 88-2019

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

BARRY GIBBS,

Cross-Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,

Cross-Respondent

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Ronald M. Bugaj, Esq.
Attorney for Cross-Petitioner
962 Main Street
Honesdale, PA 18431
(717) 253-3021

July 12, 1989

83 pgs

QUESTIONS PRESENTED

1. When an Appellant raises various grounds for appeal does the finding of trial error on one ground justifying a new trial relieve an appellate court of the need to first review the sufficiency of the evidence before remanding for retrial?

2. When an appellant raises both issues of trial error and "outrageous prosecutorial misconduct", may an appellate court reverse and remand for retrial based on the trial error only without considering the appellant's claims of "outrageous prosecutorial misconduct" which would preclude retrial under Oregon v. Kennedy?

3. In utilizing the doctrine of "transferred intent", when a defendant is charged and convicted of attempted

murder of one man, and in that attempt, another man is unintentionally killed, does collateral estoppel prevent a conviction, on basis of the same act and same set of facts, of premeditated, intentional murder of the second man?

4. Is the aggravating circumstance of "peace officer" in Pennsylvania's Death Penalty Statute, as defined by statute and law, unconstitutionally vague?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Constitutional Provisions

NO. 88-2019

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

BARRY GIBBS,
Cross-Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Cross-Respondent

CROSS-PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

Your Cross-Petitioner, Barry Gibbs, respectfully requests that a Writ of Certiorari be granted to review the final judgment and opinion of the Supreme Court of Pennsylvania, which is the highest court to render a decision in this case.

The Pennsylvania Supreme Court entered its decision on February 2, 1989. (Judgment and Opinion attached as Appendix A). Gibbs timely applied

to the Pennsylvania Supreme Court for reconsideration, and the Commonwealth cross-petitioned for reconsideration. On April 13, 1989, the Pennsylvania Supreme Court entered an Order denying reconsideration. (Order attached as Appendix B).

OPINIONS BELOW

The Judgment and Opinion of the Pennsylvania Supreme Court, unofficially reported at 553 A.2d 409 (1989), is attached as Appendix A. The unreported Opinion and Order of the Court of Common Pleas, Pike County, entered on June 24, 1986, denying post-verdict motions are attached as Appendix C. The Opinion and Order of the Court of Common Pleas, Pike County, denying reconsideration of sentence are attached as Appendix D.

STATEMENT OF JURISDICTION

The Supreme Court of Pennsylvania

entered judgment on February 2, 1989. Reargument was denied on April 13, 1989. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a); Rule of Supreme Court 19.5 (relating to Cross-Petitions); 21(e)(iii) (The Commonwealth's Petition was received on June 15, 1989).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment Five, Double Jeopardy and Due Process clauses, which provides in pertinent part:

> No person shall ... be subject for the same offense to be twice put in jeopardy of life or limb ... nor be deprived of life, liberty or property, without due process of law.

United States Constitution, Amendment Eight, provides:

> ... nor cruel and unusual punishment inflicted.

United States Constitution, Amendment Fourteen, Due Process, Equal Protection provides:

> ... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On March 29, 1984, Gibbs and several others were arrested in connection with the March 27, 1984 shooting death of George Mehl.

Co-Defendants testified that on the night of March 27, 1984, they picked up Gibbs at Honesdale, Pennsylvania. Gibbs was described as being "high" (N.T. 168; C.R. 1665), screaming out loud (N.T. 156; C.R. 1653), jumping up and down in the car and laughing (N.T. 190; C.R. 1687).

Co-Defendants further testified that they sought an individual to kill Bruce Wayne Burke, and that they drove to a private housing development, known as Hemlock Farms, where Burke and Mehl worked as security guards.

Burke and Mehl were watching television in the security guard shack when 6 shots were fired through the window. Mehl died of a single gunshot wound to the head while Burke was uninjured.

Gibbs was tried by a jury, convicted, and sentenced to death, based upon a jury's finding of four aggravating circumstances, only two of which are statutorily listed, to wit, 42 Pa. C.S. §9711 (d)(1) "peace officer", and (d)(2) "contract". At neither guilt or sentencing phases of Gibbs' trial was <u>any</u> evidence presented to prove that the victim was a "peace officer" and no evidence was presented to prove that the victim was the subject of a contract.

After a denial of post-verdict motions, Gibbs appealed, as of right, to the Pennsylvania Supreme Court asserting trial errors at both the guilt and

sentencing phases of his trial, and asserting that the evidence was insufficient to sustain both the convictions and sentence of death.

On February 2, 1989, the Pennsylvania Supreme Court rendered a decision in Gibbs' case, addressing only one issue, and ordered a new trial based upon trial error.

Gibbs applied for reargument with the Pennsylvania Supreme Court asserting that his rights under double jeopardy would be violated if that Court did not address his claims of the insufficiency of the evidence before remanding for retrial. On April 13, 1989, the Pennsylvania Supreme Court denied reargument. On June 12, 1989, the Commonwealth filed a Petition for Writ of Certiorari in the Court. Said Petition was received by Gibbs on June 15, 1989. Gibbs herein files a Cross-Petition for Writ of Certiorari.

HOW THE FEDERAL QUESTION WAS PRESENTED

This issues concerning trial errors were raised during post-verdict motions, which were denied June 24, 1986. Gibbs represented by new counsel, raised additional issues on appeal to the Pennsylvania Supreme Court which feel under the ineffectiveness of trial/post-verdict motions of counsel. Gibbs additionally filed a timely Pro Se Supplemental Brief with the Pennsylvania Supreme Court during his appeal. The Pennsylvania Supreme Court rendered judgment on February 2, 1989, addressing only one issue. Gibbs filed an Application for Reargument which was denied on April 13, 1989. The Commonwealth filed a Petition for Writ of Certiorari and this Cross-Petition follows.

REASONS FOR GRANTING THE WRIT

THE PENNSYLVANIA SUPREME COURT ERRED IN FAILING TO ADDRESS GIBBS' CLAIM THAT THE EVIDENCE WAS INSUFFICIENT TO SUPPORT BOTH HIS CONVICTIONS AND SENTENCE BEFORE REVERSING AND REMANDING FOR RETRIAL BASED ON TRIAL ERROR. SAID REFUSAL IS A COMPLETE CIRCUMVENTION OF GIBBS' RIGHTS UNDER THE DOUBLE JEOPARDY CLAUSE ESTABLISHED IN BURKS V. UNITED STATES, AND IS CONTRARY TO BOTH STATE AND FEDERAL LAW, VIOLATING GIBBS' RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS.

This Court in Burks v. United States, 437 U.S. 1 (1978) held that an appellate court's determination that the evidence presented at trial was insufficient to convict as a matter of law utilizing the standards set forth in Jackson v. Virginia, 443 U.S. 307 (1979), and that this has the same effect as a judgment of acquittal, of which the double jeopardy clause would preclude retrial. This holding was made applicable to the States in Greene

v. Massey, 437 U.S. 19 (1978), and was made applicable to the penalty phase of a capital case "because the sentencing phase at first trial was like the trial on the question of guilt or innocence, double jeopardy protection is available [ ] with respect to the death penalty at [ ] retrial." Bullington v. Missouri, 451 U.S. 430,____, 101 S.Ct. 1852, 1862, (1981).

Burks also reaffirmed the principal that a reversal for trial error, as distinguished from evidentiary insufficiency, does not preclude retrial. Burks, 437 U.S. at 16. (citing United States v. Tateo, 337 U.S. 463 (1964), and United States v. Ball, 163 U.S. 662 (1896)). But when the question is posed: "when an appellant raises both claims, does the existence of trial error as grounds for reversal relieve an appellate court of the need to first

review the sufficiency of the evidence before remanding for retrial?" Apparently the opinions of this Court have been less than crystal clear.

The opinions of this Court, and indeed common logic indicate that an appellate court must review the sufficiency of the evidence before remanding for retrial, or else the protection afforded by the double jeopardy clause would be circumvented unless the appellant raises only one issue on appeal - i.e. the insufficiency of the evidence. And were that the case, a person convicted would be deprived of the right to appeal any trial errors in his case. If this were permitted, it would present a "catch-22" situation for one convicted: either he waives his claims of trial error, or waives review of the sufficiency of the evidence - and hence, his double jeopardy protections. This Court sought to avoid that very situation in Burks by holding

that, "[i]n our view it makes no difference that a defendant has sought a new trial as one of his remedies, or even as the sole remedy. It cannot be meaningfully said that a person "waives" his right to a judgment of acquittal by moving for a new trial." Burks, 437 U.S. at 18 (citing Green v. United States, 335 U.S. 184, 191-98 (1957). Such being the case, can an appellate court properly refuse to consider a claim of insufficient evidence? This Court has noted in Tibbs v. Florida, 457 U.S. 31, ___, 102 S.Ct. 2211, 2220 (1982), that such consideration is part of a State appellate court's "obligation to enforce applicable State and Federal laws." And Justice White, in his dissenting opinion joined by Justices Brennan, Marshall, and Blackman, made is more specific: "... if retrial is to be had, the evidence must be found to be legally sufficient, as a matter of Federal law

to sustain the verdict." Id. at ____, 102 S.Ct. at 2223 (White, J., Dissenting). A similar note was made in Justice Brennan's concurrence in Justices of Boston Municipal Court v. Lydon, 466 U.S. 294 (1984), that "... when a defendant challenging his conviction on appeal contends both that the trial was infected by error and that the evidence was constitutionally insufficient, the Court may not, consistent with the rule of Burks v. United States, Supra, ignore the sufficiency claim, reverse on grounds of trial error, and remand for retrial." Id. at ___, 104 S.Ct. at 1820 (Brennan, J. Concurring). Most circuit courts have made similar conclusions. See United States v. United States Gypsum Co., 600 F.2d 414 (3d Cir.) cert. denied, 444 U.S. 884 (1979); Vogel v. Commonwealth of Pa., 790 F.2d 368, 376 (3d Cir. 1986); United States v. Gonzalez-

Sanchez, 825 F.2d 572, 588 (1st Cir. 1987); French v. Estelle, 692 F.2d 1021 (5th Cir. 1982); United States v. Sneed, 705 F.2d 745, 749 (5th Cir. 1983); United States v. Bibbero, 749 F.2d 581, 586 (9th Cir. 1984); United States v. Hodges, 770 F.2d 1475, 1477 (9th Cir. 1985); United States v. McKoy, 771 F.2d 1207, 1215 (9th Cir. 1985); United States v. Lewis, 787 F.2d 1318, 1323 (9th Cir. 1986); United States v. Palzer, 745 F.2d 1350 Fn. 4 (11th Cir. 1984). This is the law in Pennsylvania as well. In Commonwealth v. Wallace, 500 Pa. 270, 275 Fn. 2, 455 A.2d 1187, 1190, (1983), which was a capital case, reversed and remanded for retrial based on trial error, as is the case sub judice, the Pennsylvania Supreme Court held that the reversal for trial error did "not affect our review of the evidence for sufficiency which must be evaluated on

the entire trial record without regard for the correctness of the trial court's rulings, even as to matters of Constitutional dimension." (Citing Commonwealth v. Cohen, 489 Pa. 167, 413 A.2d 1066 (1980), and Commonwealth v. Hoskins, 485 Pa. 542, 403 A.2d 521 (1979)). Further, it is the law in Pennsylvania that "while [an] appellant does not specifically raise the issue of sufficiency of the evidence to sustain the convictions, this Court will conduct an independent review of the record for sufficiency in capital punishment cases." Wallace, at 273, 455 A.2d at 1189 (citing Commonwealth v. Zettlemoyer, 500 Pa. 16, 26 Fn. 3, 454 A.2d 937, 942 Fn. 3 (1982); see also Commonwealth v. DeHart, 512 Pa. 235, 516 A.2d 656 (1986); Commonwealth v. Duffey, 519 Pa. 348, 548 A.2d 1178 (1988); Commonwealth v. Hughes, ___ Pa. ___, 555 A.2d 1264

(1989)). In the case sub judice, the Appellant Gibbs did specifically raise the issue of the sufficiency of the evidence at both guilt and penalty phases of his capital trial, in counsel's "Brief for Appellant" and in the "Appellants's Pro Se Supplemental Brief." The Pennsylvania Supreme Court however, disregarding both State and Federal law, reversed and remanded for retrial without addressing Gibbs' claims that the evidence was insufficient to support both convictions and penalty.

Allowed to stand, this would constitute a violation of Gibbs' rights under the double jeopardy clause, due process and equal protection clauses. Gibbs would be "subjected to the hazards of trial and possible conviction [and sentence of death] more than once for an alleged offense," Green, 355 U.S. at 187; which the prosecution has initially failed to prove. Burks, Supra; French

THE PENNSYLVANIA SUPREME COURT ERRED IN REFUSING TO REVIEW GIBBS' CLAIMS OF "OUTRAGEOUS PROSECUTORIAL MISCONDUCT" BEFORE REVERSING AND REMANDING FOR RETRIAL BASED UPON OTHER TRIAL ERROR, PRETERMITTING THE DOUBLE JEOPARDY IMPLICATIONS ESPOUSED IN OREGON V. KENNEDY, THEREBY DEPRIVING GIBBS OF DUE PROCESS AND EQUAL PROTECTION OF THE LAWS.

In Oregon v. Kennedy, 456 U.S. 667, 676 (1982), this Court held that "[o]nly where the governmental conduct in question is intended to "goad" the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." Sometimes, however, a trial judge may be reluctant to grant a requested mistrial no matter how egregious the prosecutorial misconduct. In such cases, "[i]ndeed, it is not hard to imagine that once [the prosecutor] suspected the trial judge was not about to grant any of [the defendant's] many mistrial motions, [the prosecutor] pushed harder and

harder to infect the trial irreparably." Petrucelli v. Smith, 544 F. Supp. 627, 638 (W.D.N.Y. 1982). This is why that Court articulated the general rule that for the purposes of a double jeopardy analysis, reversal of a conviction by an appellate court for deliberately offensive prosecutorial misconduct warrants the same relief as a mistrial granted on those grounds. Id., at 632. See also United States v. Roberts, 640 F.2d 225 (9th Cir.), cert. denied, 452 U.S. 942 (1981). Other courts are undecided on the issue. See United States v. Curtis, 683 F.2d 769, 776 (3d Cir.), cert. denied, 459 U.S. 1018 (1982); United States v. Singleterry, 683 F.2d 112, 124-125 (5th Cir.), cert. denied, 459 U.S. 1021 (1982).

In the case sub judice, the deliberately offensive conduct of the prosecutor was persistent throughout Gibbs' trial, becoming more and more pervasive

as the defense was presented. The prosecutor: (a) elicited irrelevant, remote and highly prejudicial information from witnesses; (b) repeatedly stigmatized the defendant and introduced and argued defendant's "bad character" when no character evidence was introduced by the defense; (c) called the defendant a "liar" no less than 21 times, without an iota of evidence to support such an assertion; (d) the prosecutor repeatedly, maliciously, intentionally and prejudicially misstated facts, testimony, and evidence in his cross-examination and in his final summation to the jury; (e) the prosecutor submitted his personal opinions of the credibility of the witnesses' testimony; (f) the prosecutor derogated the defense and defense strategy with his personal opinions; (g) the prosecutor introduced statements into evidence that were never properly

before the court; (h) the prosecutor threatened defense witness Jennifer Dean to prevent her from testifying for Gibbs (it should also be noted that while Gibbs' direct appeal was pending, Miss Dean was found dead. Her death is considered "suspicious" and is currently unsolved); and (i) the prosecution knowingly withheld exculpatory evidence. Each act of the prosecutor in this case was in blatent violation of State and Federal law. (See "Appellant's Pro Se Supplemental Brief" to the Pennsylvania Supreme Ccurt, filed September 8, 1987, pp 10-43).

The pervasiveness and timing of the prosecutorial misconduct in this case are indicia of the prosecutor's intent to either "goad" the defendant into seeking a mistrial, or, in the absence of a mistrial, to try the case on his own terms without regard to State and Federal restrictions on his conduct. Under

double jeopardy, due process and equal protection of the laws, cross-petitioner submits that this issue must not go unadjudicated prior to retrial.

THE PENNSYLVANIA SUPREME COURT REFUSED TO APPLY COLLATERAL ESTOPPEL WHERE THE PROSECUTION'S THEORY OF THE CASE AND EVIDENCE PRESENTED TO SUPPORT THAT THEORY IS THAT THE DEFENDANT'S SINGLE ACT OF INTENT TO COMMIT THE MURDER OF A SPECIFIC VICTIM RESULTS IN THE UNINTENTIONAL KILLING OF ANOTHER PERSON, AND THE DEFENDANT IS PROSECUTED FOR BOTH ATTEMPT TO COMMIT MURDER OF THE INTENDED VICTIM AND FIRST DEGREE MURDER OF THE UNINTENDED VICTIM, THAT SINCE THE PROSECUTION HAS SOUGHT AND OBTAINED A CONVICTION OF ATTEMPTED MURDER OF THE INTENDED VICTIM, THE PROSECUTION SHOULD BE COLLATERALLY ESTOPPED FROM ALSO OBTAINING A FIRST DEGREE MURDER CONVICTION OF THE UNINTENDED VICTIM ON THE BASIS OF THE SAME ACT AND SAME SET OF FACTS IN EVIDENCE.

In the case sub judice, the prosecution sought to prove that Gibbs was solicited to murder Bruce Wayne Burke, and that in the attempted murder of Burke, another man, George Mehl, was accidently killed. Gibbs was charged

with, and convicted of, interalia, the attempted murder of Burke, and first degree murder of Mehl.

The Commonwealth put forth a theory of "transfered intent", i.e., "if an individual in attempting to kill one person, kills another, he is guilty as if he had killed the person he had intended to kill." Commonwealth v. Eisenhower, 181 Pa. 470, 37 A. 521 (1897); Commonwealth v. Lyons, 283 Pa. 327, 129 A. 86 (1925). In such a situation, the Commonwealth is bound to one charge or the other, i.e., attempted murder or murder. The history of the "transferred intent" doctrine indicates just that. Commonwealth v. Lyons, Supra; Commonwealth v. Eisenhower, Supra; Commonwealth v. Breyessee, 160 Pa. 451 (1894); Commonwealth Ex rel. McCant v. Rundle, 418 Pa. 394 (1965) (First degree murder only); Common-

wealth v. Bailey, 450 Pa. 197 (1973) (seond degree murder only); Commonwealth v. DeMatteo, 328 Pa. 359 (1938) (voluntary manslaughter only). The logic is simple, either the intent is "transferred", or it is not. It cannot be multiplied into two separate intents. The jury in returning a verdict of guilty to the charge of attempted murder [1] of Burke had made a finding of fact: that the intent was not transferred to Mehl. The jury having made such a determination, the Commonwealth cannot, consistent with collateral estoppel, prosecute the defendant for the first degree intentional murder of Mehl. Ashe v. Swenson, 397 U.S. 436 (1970).

---

[1] Attempted murder is a specific intent crime in Pennsylvania. See Commonwealth v. Griffin, 310 Pa. Super. 39, 50-54, 456 A.2d 171 (1983).

THE USE OF THE AGGRAVATING CIRCUMSTANCE OF "PEACE OFFICER" IN THIS CASE TO SUPPORT GIBBS' SENTENCE OF DEATH IS AN ARBITRARY AND CAPRICIOUS APPLICATION OF SAID FACTOR SINCE IT IS AN ILL-DEFINED TERM IN PENNSYLVANIA, AND IS UNCONSTITUTIONALLY VAGUE AS APPLIED, VIOLATING THE EIGHTH AMENDMENT'S BAN ON CRUEL AND UNUSUAL PUNISHMENT.

Pennsylvania's Death Penalty Statute, 42 Pa. C.S. §9711, lists as aggravating circumstance (d)(1): "the victim was a fireman, peace officer or public servant concerned in official detention, as defined in 18 Pa. C.S. §5121 (relating to escape), who was killed in the performance of his duties."

The term "peace officer" seems specific enough if the victim is a State Trooper, or county sheriff, but the category loses definition, and boundaries are hard to find if the victim was a "dog warden"; a private detective; a store's security guard; or as in the instant case, a privately

employed security guard at a private housing development.

At the time of the crime in the case sub judice, "peace officer" was defined in 18 Pa. C.S. §501 as:

> Any person by virtue of his office or public employment is vested by law with a duty to maintain public order or to make arrests for offenses, whether that duty extends to all offenses or is limited to specific offenses, or any person on active state duty pursuant to Section 311 of the Act of May 27, 1949 (P.L. 1903, No. 568), known as "the Military Code of 1949".

This definition was amended by the Act of July 6, 1984, P.L. 647, No. 134, (eff. 90 days) to add to the above definition, "the term "peace officer" shall also include any member of any park police department of any county of the third class." These definitions are, at best, ambiguous, and leave much speculation on how many of the nearly 30 kinds of statutory officers in this Commonwealth are "peace

officers."[2] Even a citizen making a "citizen's arrest" or assisting police could be considered. See Commonwealth v. Fields, 120 Pa. Super. 397 (1936).

---

[2] See, 3 Pa. C.S. §§459-461 (Dog Wardens); 13 Pa. C.S. §45 (constables); 16 Pa. C.S. §2512 (Park Police); 16 P.S. §6034 (county park police); 16 Pa. C.S. §7741 (district attorney's county detectives); 18 Pa. C.S. §3929 (c) (store security guards); 18 Pa. C.S. §3929.1(d) (library agent); 22 P.S. §16 (private detectives); 22 Pa. C.S. §501 (police for non-profit corporations); 22 Pa. C.S. §§3301-3303 (transit police); 24 Pa. C.S. §§7-778 (school police); 30 Pa. C.S. §901 (waterways patrol officers); 34 Pa. C.S. §1311.214 (game protectors); 35 Pa. C.S. §1550 (housing authority police); 36 Pa. C.S. §3305 (Delaware bridge police); 38 Pa. C.S. §§51, 53, (street railway police); 42 Pa. C.S. "2921 (sheriff); 42 Pa. C.S. §§3100-3154 (judicial officers); 42 Pa. C.S. §§8951-8954 (municipal police); 43 P.S. §217.1 (Delaware County park police); 47 Pa. C.S. §§2-209 (liquor control board police); 53 Pa. C.S. §§731-736 (auxiliary police); 53 P.S. §3704 (night watchmen); 53 P.S. §12638 (fire marshall); 53 Pa. C.S. §16517 (Philadelphia Fairmont Park Police); 53 Pa. C.S. §23407 (park police); 53

(Footnote continued)

The authority of some of Pennsylvania's numerous statutory officers have been defined by courts, see e.g. Commonwealth v. Lacy, 324 Pa. Super. 379, 471 A.2d 888 (1984) (Store Security Guards Act only in the capacity of private citizens); Lang v. County of Delaware, ___ Pa. Cmwlth. ___, 490 A.2d 20 (1985) (county park police member is a "peace officer"). Others have not, leaving a void in a determination of what is, and what is not a "peace officer", for purposes of that aggravating circumstance in Pennsylvania's Death Penalty Statute, leading to an arbitrary and capricious use of that aggravating factor.

(Footnote continued)

Pa. C.S. "46121 (borough police); 53 Pa. C.S. §56403 (township police); 61 Pa. C.S. §3091 (probation officers); 61 Pa. C.S. §331.27 (parole officers); 71 Pa. C.S. §§250-252 (Pennsylvania State Police); 71 Pa. C.S. §510 (Forest Officers); 71 P.S. "646 (Capitol police); et al.

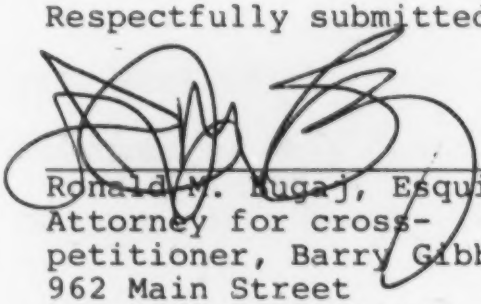
Indeed, cases arising in Pennsylvania indicate such a result: Commonwealth v. Christy, 511 Pa. 490, 515 A.2d 832 (1986) (victim was "night watchman", not used as aggravating circumstance); Commonwealth v. Maxwell, 355 Pa. Super. 575, 513 A.2d 1382 (1986) (store security guard not used as aggravating circumstance); Commonwealth v. Basemore, No. ____ E.D. Appeal Docket 198__ (Phila. Co. C.P. # 1762-1765, 1987 Term) (victim was store security guard, not used as aggravating factor); Commonwealth v. Gibbs, ____ Pa. ____, 553 A.2d 409 (1989) (the case sub judice, the victim was a privately-employed security guard - was used as aggravating factor). The aggravating circumstance of "peace officer" in Pennsylvania's Death Penalty Statute does not meet this Court's demand that "Death Penalty Statutes be structured so as to prevent the

penalty from being administered in an arbitrary and unpredictable fashion." California v. Brown, ___ U.S. ___, 107 S.Ct. 837, 839 (1987). Pennsylvania's use of the aggravating circumstance of "peace officer" has shown that it does "fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman v. Georgia, 408 U.S. 238 (1972), could occur". Zant v. Stephens, 462 U.S. 862, 877 (1983). See also Godfrey v. Georgia, 466 U.S. 420, 428 (1980); Spaziano v. Florida, 468 U.S. ___, 104 S.Ct. 3154 (1984); Maynard v. Cartwright, ___ U.S. ___, 108 S.Ct. 1853 (1988).

CONCLUSION

For the foregoing reasons, your cross-petitioner, Barry Gibbs, respectfully requests that a Writ of Certiorari be granted to review the decision below.

Respectfully submitted,



Ronald M. Rugaj, Esquire
Attorney for cross-petitioner, Barry Gibbs
962 Main Street
Honesdale, PA 18431
(717) 253-3021

July 12, 1989

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

Commonwealth of Pennsylvania	:	No. 96 E.D. Appeal Docket 1986
v.	:	
Barry Gibbs, Appellant	:	

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that Appellant's request for a new trial is granted.

/s/
Marlene F. Lachman, Esq.
Prothonotary

Dated: February 2, 1989

J-150-1988

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	No. 96 E.D. Appeal Docket 1986
	:	Appeal from the Orders of the Court of Common Pleas of Pike
v.	:	County, Entered on June 24, 1986, and November 4, 1986, at No. 89-1984-Criminal Division
BARRY GIBBS, Appellant	:	RE-ARGUED: September 27, 1988

OPINION OF THE COURT

FILED: February 2, 1989

MR. JUSTICE PAPADAKOS

This case involves the imposition of a death sentence. The Appellant alleges seventeen errors below. We conclude on one issue that his right to request an attorney pursuant to the warnings required by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) and its progeny was

impaired by the authorities and his subsequent statements were admitted improperly into evidence. For this reason, we order a new trial following automatic review by this Court pursuant to 42 Pa.C.S. §9711 (h)(i).

Appellant was convicted in the shooting death of a security guard. Evidence at the guilt stage of the trial demonstrated that a co-defendant had hired Appellant to kill her husband. The shooting, however, actually resulted in the death of a co-worker guard for which Appellant and several others were arrested two days later. The following testimony relevant to this opinion was given by the State Police Trooper describing his administering of the Miranda warnings:

> Q. O.K. Can you continue? Just tell us what happened when you first started the interview.
>
> A. O.K. I read the Miranda warnings to him. He indicated that he understood. At that particular point he

then asked or he made the statement, "Maybe I should talk to a lawyer. What good would it do me to tell you?" I responded by telling him, "I really don't know what good it would do. The only thing is I would tell the District Attorney you cooperated for whatever good that would be, but I would have no idea whether it would help your case or not."

THE COURT: I might note that the last statement of the witness was done without reading from the paper.

A. I don't really understand.

BY MR. GUCCINI:

Q. O.K. Continue.

A. O.K. Then Corporal Hague also told him that this was strictly up to him, and that he was there, he knew what happened, and he was the only one that was not family, and he had to make the decision himself on what he should do. All right. And referring to the paper, he signed the waiver at 12:05. (Reproduced Record at pp. 333-334.)

Our decision narrowly focuses on the issue of whether the Trooper's response that "the only thing is I would tell the District Attorney you cooperated for whatever good that would be" constituted an impermissible misleading inducement to the

Appellant not to pursue further his ambiguous and equivocal inquiry regarding the presence of an attorney. Our recent opinion in Commonwealth v. Hubble, 509 Pa. 497, 504 A.2d 168 (1986), (per Larsen, J., with two Justices concurring, one Justice concurring specially, and one Justice concurring in part), provides the basis of our disposition of this case.

In Hubble, the Appellee and his wife voluntarily went to the State Police Barracks where Miranda rights were given by the police. At that time, the wife suggested to her husband that he get a lawyer, following which the Appellee stated to the police, "I want a lawyer," and "I want a public defender." The police thereupon encouraged and aided Hubble unsuccessfully to telephone an attorney. At his request, they also succeeded in contacting his probation officer who, likewise, advised Appellee to find a lawyer. The facts

showed that the police advised him that a public defender might not come to the police barracks, while they still continued to urge him to call the public defender. Appellee and his wife then put on their coats, proceeded towards an exit, but after conferring at length and being told that the police now had information placing him at the scene of the crime, Hubble returned to give an inculpatory statement.

In an appeal of the use at trial of the admission, we held in Hubble, first, that Appellee's utterances regarding an attorney were too imprecise to trigger the prophylactic rule barring further police interrogation as required by Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d (1981), reh'g. denied, 452 U.S. 973, 101 S.Ct. 3128, 69 L.Ed.2d 984 (1981): "To hold that every utterance of the word 'lawyer' automatically" invokes Edwards "would be far too rigid and would not serve

the interests of justice." We also concluded, secondly, that Appellee was not misled by the erroneous police statement regarding the public defender. We then included Appellee's utterances within the totality of circumstances test of Oregon v. Bradshaw, 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983), which holds that where a suspect rather than the police initiates further conversation, the evidence is not suppressed automatically under Edwards. We buttressed this last conclusion by noting as well that even if the initial admission had been infirm, Hubble voluntarily gave statements later which in any case cured any original defect. We stressed the fact the police "scrupulously honored" Hubble's equivocal statement regarding the need for a lawyer by helping him look up an attorney's telephone number and providing him with a telephone. Finally, in Hubble we made a crucial finding that the suspect was

not misled by the erroneous police statement that the public defender would not travel to the barracks, and we reiterated that conclusion in our opinion. Hubble at 511, 504 A.2d at 173 and 175. We emphasize the absence of any misleading act because it is readily apparent that an opposite finding in Hubble would have resulted in a different outcome.

In the present case under review, we hold that the statement by the authorities to Griggs [sic] was an impermissible inducement and thereby tainted his admissions. By conveying the distinct impression that the district attorney would be told of his cooperation in giving a confession on the spot, there occurred an inescapable inducement which cannot be condoned under our law. For while we recognize that the police have a legitimate responsibility to conduct investigations, including interrogations, criminal suspects have a constitutional

right to make up their own minds as to whether they want the Miranda protections. Promises of benefits or special considerations, however benign in intent, comprise the sort of persuasion and trickery which easily can mislead suspects into giving confessions. The process of rendering Miranda warnings should proceed freely without any intruding frustration by the police. Only in that fashion can we trust the validity of subsequent admissions, for if the initial employment of Miranda is exploited illegally, succeeding inculpatory declarations are compromised. Misleading statements and promises by the police choke off the legal process at the very moment which Miranda was designed to protect.

Our analysis rests squarely on Hubble. There we affirmed the admissibility of a confession only after we were able to determine that the authorities had "scrupulously honored" the suspect's rights and that he

had not been misled by investigative inquiries. Moreover, Hubble's approval of a confession following Appellee's initiation of a conversation with the police itself was predicated on an absence of efforts by interrogators to mislead and induce the suspect and took place after the suspect was read his rights. By contrast, here the improper suggestion of a benefit in return for cooperation poisoned the interrogation system. We are not prepared to say that the Appellant's initiation of conversation in this case is constitutionally permissible unless there is a prior finding that the initiation was not induced in the first instance but occurred after Miranda warnings were given. Since the circumstances of this case preclude such a finding, we now decide that the inculpatory testimony given at the barracks was infirm.

Because we hold that the police engaged in an inducement, there is no need to

address the issue of whether the utterance regarding an attorney was sufficiently precise to pass muster under Hubble. On the one hand, if it is assumed that a valid request was made, Edwards would have halted all further interrogation. Subsequent conversation by the suspect then likewise would be tainted because it would be the product of continuing improper persuasion. On the other hand, if the utterance did not qualify as an unequivocal call for an attorney, at that point the police also were not justified in promoting an admission by suggesting a benefit if the suspect would not ask for representation. In our decision today, we decide only that the authorities are not permitted to employ inducements which impair, in any way, a suspect's right to his own unfettered evaluation of the need for legal counsel. Miranda and its progeny, especially Hubble, otherwise would make no sense.

Appellant's request for a new trial is granted.

The remaining allegations in this appeal are not addressed by this decision.

MR. JUSTICE LARSEN files a Dissenting Opinion in which MR. JUSTICE FLAHERTY and MR. JUSTICE McDERMOTT join.

J-150-1988
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	No. 96 E.D. Appeal Docket 1986
	:	Appeal from the Orders of the Court of Common Pleas of Pike
v.	:	County, Entered on June 24, 1986, and November 4, 1986, at No. 89-1984-Criminal Division
BARRY GIBBS, Appellant	:	RE-ARGUED: SEPTEMBER 27, 1988

DISSENTING OPINION

FILED: February 2, 1989

JUSTICE ROLF LARSEN

I dissent. Contrary to the majority's conclusion, appellant's statements were not inadmissible under Commonwealth v. Hubble, 509 Pa. 497, 504 A.2d 168 (1986). Also, contrary to the majority's conclusion, I do not agree that there was an "impermissible inducement" by police officers in this case that "tainted" appellant's statements.

As we stated in Hubble, Edwards v. Arizona, 451 U.S. 477 (1981), reh'g. denied, 452 U.S. 973 (1981), does not require a police officer to stand mute when an equivocal mention of the word "lawyer" is uttered by an accused who has been given his Miranda warnings. In the instant case, appellant merely stated "Maybe I should talk to a lawyer. What good would it do me to tell you?" The police officer responded, in good faith, that he did not know what good it would do him but that he (the officer) would tell the District Attorney of appellant's cooperation. I do not interpret appellant's question "what good would it do me to tell you" as a request for a legal opinion from the officer on the legal advantages to be gained by securing legal counsel, nor do I interpret "Maybe I should talk to a lawyer" as an unequivocal request to cease interrogation and retain a lawyer; neither did the suppression court make such

interpretations. I would affirm the suppression court and I would uphold the admissibility of appellant's statements.

Mr. Justice Flaherty and Mr. Justice McDermott join in this dissenting opinion.

SUPREME COURT OF PENNSYLVANIA
Eastern District
468 City Hall
Philadelphia, PA 19107

April 17, 1989

Ronald M. Bugaj, Esquire
962 Main Street
Honesdale, PA 18431

RE: Commonwealth of Pennsylvania
v. Barry Gibbs, Appellant
NO. 96 E.D. APPEAL DOCKET 1986

Dear Mr. Bugaj:

This is to advise you that the following Order has been endorsed on your Application for Reargument, filed in the above captioned matter:

"April 13, 1989.

Application Denied.

Per Curiam."

Mr. Justice Larsen would grant reargument.

Very truly yours,

/s/
MARLENE F. LACHMAN, ESQUIRE
Prothonotary

/pj
cc: Barry Gibbs
Michael E. Weinstein, Esquire
Robert A. Graci, Esquire
Gaele McLaughlin Barthold, Esquire
Marianne E. Cox, Esquire
West Publishing Company

IN THE COURT OF COMMON PLEAS
OF PIKE COUNTY, PENNSYLVANIA
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	NO. 89 - 1984
-vs-	:	
BARRY GIBBS, Defendant	:	

OPINION and ORDER

FACTS:

The matter before the Court is determination of Defendant's Post-Trial Motions. Defendant filed a Motion for Arrest of Judgment and Motion for a New Trial. Defendant seeks a change of venue or venire with regard to the New Trial.

> "The Defendant was arrested on March 29, 1984, in Honesdale, Wayne County, Pennsylvania and a complaint was filed on that date. The Defendant was charged with Criminal Homocide [sic], Criminal Attempt to Commit Homicide, two counts of Criminal Conspiracy to Commit Criminal Homicide and Aggravated Assault.
>
> On April 26, 1984, the Defendant was given a Preliminary Hearing before District Justice Dore N. James. The Defendant was then bound over to the Court of Common Pleas without bail.

> On April 26, 1984, Barry Gibbs was arraigned and pled not guilty to the Commonwealth's charges. A hearing was held on November 20, 1984, on the Defendant's Omnibus Pretrial Motions. The Defendant moves for suppression of oral and written statements taken from him and the co-Defendants: Sharon Ann Burke, Bonnie Lynn Hagan, and Betsy Ann Burke, by the State Troopers. The Defendant seeks suppression of certain physical evidence. A Motion for Severance is requested. The Defendant also seeks a change of venue and psychiatric examination. The Defendant moves to quash certain information. The Defendant also has moved to employ a special investigator." Commonwealth v. Gibbs, No. 89-1984, Criminal Slip op. (Pike Cty.) November 26, 1984.

Defendant's Motion's [sic] for Suppression of Evidence, oral, written and physical were denied. Defendant's collateral Motion for Suppression of co-defendants' statements were granted. Defendant's Motion for a Severance, Psychiatric Examination and Request to Employ a Special Investigator had been previously granted. Defendant's Motion for Change of Venue and Motion to have the Information Quashed were denied.

This case then proceeded to trial. A jury was impanelled after five days of individual voir dire. At the close of the five day trial, the jury found the Defendant guilty of Criminal Homicide in the first degree, two counts of Criminal Attempt to Commit Homicide, two counts of Criminal Conspiracy to Commit Homicide and Aggravated Assault.

Immediately after the verdict of guilty of murder in the first degree was rendered, the sentencing hearing commenced. The aggravating and mitigating circumstances were argued. Defendant then took the stand against the advice of his counsel and the Court and asked the jury:

> "... to set aside all the mitigating factors and follow the D.A.'s recommendations that I get the death penalty. In life in prison you live in prison. You grow old, and you die. I would rather die while I am young." N.T. p. 420.

The jury found that the Defendant should be sentenced to death, finding two aggravating

circumstances which outweigh the mitigating circumstances.

Within the required ten days for filing Post Trial Motions, Defendant filed a Motion for Arrest of Judgment and Motion for New Trial. Subsequently, Defendant filed a Change of Venue or Venire with regard to Defendant's Motion for New Trial. Argument on these motions was continued generally until receipt of transcription of Notes of Testimony and Notes of Voir Dire of Prospective Jurors. Such were filed in October and November of 1985. Argument was ultimately held on May 2, 1986, which gave both parties due time to brief motions and response thereto prior to argument.

OPINION:

The all encompensing [sic] issue for court determination is whether or not the Defendant's Motion for Arrest of Judgment should be granted. The Defendant contends

that the evidence was insufficient to sustain a conviction.

Initially, the Defendant argues that the verdict is contrary to the evidence in that the testimony indicated that the Defendant was under the influence of drugs which caused him to be unaware of the nature and quality of his action at the time the victim was killed. Defendant further contends that due to Defendant's mental condition, drug abuse, beliefs in satanism and his drug induced intoxication at the time the victim was killed, the Defendant did not know that his actions were wrong.

The Defendant's witness, A.J. Turchetti, M.D., was asked at trial after examining the Defendant to speculate as to the effect of various drugs on the brain. Dr. Turchetti delineated the effect of various drugs and combinations thereof, but, he had no evidence that on the night in question the Defendant was suffering

from such effects. Defendant indicated to the Doctor that he had ingested such drugs on the night in question; however, when co-defendant, Bonnie Hagan was asked if she was aware of the Defendant being under the influence of drugs on the evening of the killing, she apparently did not think he was.

"Q. ... Have you ever been around anyone who has been under the influence of drugs?
A. Yes, I have.
Q. On more than one occasion?
A. Yes, I have.
Q. So you have been around someone in that condition?
A. Right.
Q. Have you ever been around Barry when he was in that condition?
A. No, I haven't."
N.T. pp. 39, 40.

In fact, no where [sic] in the testimony do we find any evidence that Barry Gibbs was under the influence of drugs on the night or during the day of the killing.

Commonwealth witness R.L. Sadoff, M.D. also formed the opinion that the Defendant was not suffering from any type of

psychosis, brain or toxic on the evening in question.

"Q. Directing your attention to the evening of the crime, the shooting, based upon the examination of Mr. Gibbs, did you form an opinion as to whether or not Mr. Gibbs was suffering from any sort of phychosis, any sort of mental illness that evening?

A. Yes, I did.

Q. Will you tell us what that opinion is?

A. My opinion was that he was not. There was no evidence that he was having any thought disorder, that he was under any psychosis that evening.

R.L. Sadoff, M.D. - Direct

Q. And so that we understand what evidence or material leads you to make that conclusion?

A. The material is the, number one, all of the police investigations, evaluations and reports, my own evaluation of Mr. Gibbs and the behavior that he was involved in. There is no indication he was out of touch with reality. He knew what he was doing. He knew where he was going. He was aware that this might be a police officer. He did not want to shoot. He was resistant at first and came back to the car, was egged on to go ahead. Even though he said it was then out of his control, that he had no choice, if he were psychotic, out of touch with reality, he would not have in my opinion

> have gone to the right window, aimed the gun at the person, whom he believed was Mr. Burke, and then shot a person. If he were so psychotic, if he were so mentally ill, especially if he was to have an organic brain psychosis, or a toxic psychosis, as is alleged, in that case he would stagger, stumble, his aim would have been off, he would have shot a tree, not realizing what he was doing. If a person is psychotic, they are not doing what they are supposed to be doing purposefully. They are doing something bizarre, totally out of contact with reality. The fact that he was able to carry out the plan that was intended indicated to me that he was not in an organic psychosis. There is no indication of any other type of psychosis he could have had that night. So what he told me as to what he did and all the evidence leads me to that conclusion." N.T. pp. 339-341 (Emphasis added)

Therefore, because no evidence of drug influence on that day exists, we must determine whether or not the Defendant was competent to stand trial.

Dr. Turchetti was asked to form an opinion with regard to Defendant's competency to stand trial. Dr. Turchetti's response was:

> "Well, at the time I saw him, of course, he was not on drugs. He was not on alcohol. He was not psychotic. His mind was clear. I felt that certainly the existence of a personality disorder would not preclude him from being able to cooperate with his counsel in the preparation of a defense. I felt in response to my questions he was aware of the charges against him and he understood the nature of the criminal trial process. So my conclusion was, yes, he was competent to stand trial." N.T. p. 268.

In addition, Dr. Turchetti requested Dr. Krasno to perform a battery of psychological testing "merely to see if there was anything in psychological testing, which would turn up something that I wasn't seeing. This is most likely to occur in a physical examination. After looking at x-rays, he might find a fracture that was there or not." N.T. p. 268. After Dr. Turchetti had an opportunity to review the report, he stated that "It confirmed my diagnosis, and it offered nothing further in the way of psychosis. It just confimed

that what he was seeing was the same thing that I was seeing." N.T. p. 269.

Without further discussion, we find that the verdict was not contrary to the weight of the evidence. We believe that the evidence did not clearly indicate that the Defendant was under the influence of drugs or suffering from a mental condition which caused him to be unaware of the nature and quality of his actions at the time the victim was killed.

The Defendant next contends that the verdict was contrary to the law as given to the jury during the closing. Defendant contends that the jury failed to apply the law of Diminished Capacity under 18 Pa.C.S. §308 and they failed to consider the legal test for insanity as defined by the McNaughten Rule. The aforementioned discussion clearly indicates that insufficient evidence of the Defendant's diminished capacity and/or insanity was presented to the

jury to apply such law. Therefore, the verdict was not contrary to the law.

Defendant's next contention is that the trial court erred in failing to grant the Defendant's Suppression Motion in that oral statements made to Trooper Robert McDevitt were involuntary. We do not believe that any statements given to the troopers were involuntary or taken in contravention of Defendant's constitutional rights as espoused in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d (1966). Because no after-discovered evidence in this regard has been submitted to the court, our position remains identical with our discussion and decision in our November 26, 1984 Opinion and Order. Commonwealth v. Gibbs, No. 89-1984, slip op (Pike Cty. Reporter) November 26, 1984.

Defendant's next contention is that the trial court erred in failing to grant the Defendant's Motion for Change of Venue.

Under Commonwealth v. Tolassi, 413 A.2d 1003 (1980) as cited by the Commonwealth, "A motion for change of venue is within the sound discretion of the trial judge and his decision will not be overturned absent an abuse of discretion." Also under Rule 312 (a) we find that "venue or venire may be changed by that court when it is determined after hearing that a fair and impartial trial cannot otherwise be had in the county where the case is currently pending."

> "Petitions or motions for change of venue or venire are granted if certain criteria are met. 'A comprehensive review of the appellate court cases which have dealt with the issue are found in Commonwealth v. Casper, 481 Pa. 143, 392 A.2d 287 (1978). There the Court said: 'Normally, one who claims that he has been denied a fair trial because of prejudicial pretrial publicity must show actual prejudice in the empaneling of the jury. See Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975); Commonwealth v. Rolison, supra; Commonwealth v. Hoss, 469 Pa. 195, 201, 364 A.2d 1335 (1976); Commonwealth v. Pierce, 451 Pa. 190, 195, 303 A.2d 209, cert. denied, 414 U.S. 878, 94 S.Ct. 164, 38 L.Ed.2d 124 (1973). But this rule is subject to an important

exception. In certain cases there 'can be pretrial publicity so sustained, so pervasive, so inflammatory, and so inculpatory as to demand a change of venue without putting the defendant to any burden of establishing a nexus between the publicity and actual jury prejudice.' Commonwealth v. Frazier, 471 Pa. 121, 127, 369 A.2d 1224, 1227 (1977), because the circumstances make it apparent that there is a substantial likelihood that a fair trial cannot be had. See Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963); Commonwealth v. Rolison, supra; Commonwealth v. Dobrolenski, 460 Pa. 630, 334 A.2d 268 (1975), citing American Bar Association [S]tandards Relating to Fair Trial and Free Press §3.2 (Approved Draft, 1968); Commonwealth v. Pierce, supra.[6] (Footnote omitted.) It is this exception that we must discuss here.'

The court stated that the mere fact that there has been pretrial publicity and that jurors have some knowledge of the facts attendant upon the crime, does not warrant a change of venue. It then sets standards by which the hearing judge should make a determination of the issue, as follows:

'We instead look to more discrete factors, viz., whether the pre-trial publicity was, on the one hand, factual and objective, or, on the other hand, consisted of sensational inflammatory and 'slanted articles demanding conviction,' United States v. Sayers,

423 F.2d 1135, 1343 (4th Cir. 1970);[7] (Footnote omitted.) whether the pre-trial publicity revealed the existence of the accused's prior criminal record;[8] (Footnote omitted.) whether it referred to confessions, admissions or re-enactments of the crime by the defendant;[9] (Footnote omitted.) and whether such information is the product of reports by the police and prosecutorial officer.[10] (Footnote omitted.) Should any of the above elements be found, the next step of the inquiry is to determine whether such publicity has been so extensive, so sustained and so pervasive that the community must be deemed to have been saturated with it. In this connection the size and character of the area concerned, and more particularly the pervasiveness of the media coverage in the community, warrant consideration." Commonwealth v. Beers et al., No. 95, 105 and No. 96, 104-1984 slip op. (Monroe County June 7, 1984)" Commonwealth v. Burke, No. 85-1984 slip op (Pike Cty. Reporter) December 26, 1984.

In reviewing the factors as applied to the case at bar, we find that the pre-trial publicity was factual and objective and the articles were not slanted demanding conviction. The articles did not reveal the existence of the accused [sic] prior criminal record nor did the articles refer to

confessions or admissions by the Defendant. While some articles referring to reenactments of the crime were published, approximately 28 of 34 were published six-months before the Defendant's trial. Therefore, such articles were long forgotten prior to Defendant's trial.

Furthermore, the publicity was not so extensive as to saturate the community. Defendant contends that during voir dire many prospective jurors were aware of some of the articles; however, the empanelled jury was not prejudiced by such pre-trial articles. As Commonwealth v. Casper, Ibid. stated: "Normally, one who claims that he has been denied a fair trial because of prejudicial pre-trial publicity must show actual prejudice in the empaneling of the jury." It does not appear that actual prejudice was shown in the instant case.

The Defendant next contends that the trial court erred in allowing the admission

into evidence of Commonwealth Exhibit Number 5, a color photograph of the deceased, as it was merely cumulative evidence in light of the previous testimony of Commonwealth witness, Wayne Burke, and any value it may have had was far outweighted [sic] by the passion and prejudice it evoked in the minds of the jurors. We do not agree with this premise as the picture was admitted into evidence to depict the path of the bullets. Prior to trial, all photographs were examined by the court and the photograph admitted into evidence was found not to be inflammatory or offensive. Such evidence was more probative for the Commonwealth's purposes than prejudicial to the Defendant.

Defendant also contends that Dr. Miholakis' sketch of the path of the bullet was cumulative evidence because it was not disputed by the Defendant. Whether or not such path of the bullet was in dispute, the

Commonwealth utilized such diagram to link their evidence. The diagram was not found to be redundant therefore, it was permitted. "Use of diagrams or blackboards is permissible within the trial court's discretion." Commonwealth v. Ayala, 277 Pa. Super. 363, 419 A.2d 1187 (1980).

Next, defendant argues the inapplicability of 42 Pa. Cons. Stat. Ann. §9711 (d)(1) (Purdon 1980). The statute reads as follows: "Aggravating circumstances shall be limited to the following: The victim was a fireman, peace officer or public servant concerned in official detention, as defined in 18 Pa. C.S. §5121 (relating to escape), who was killed in the performance of his duties." Defendant claims the victim cannot be classified as a "peace officer" and thus asserts the nonexistence of an aggravating circumstance. Consequently, Defendant asserts that the victim, a private security guard, is precluded from

the scope of coverage enunciated in 42 Pa. Cons. Stat. Ann. §9711 (d)(1) (Purdon 1980). Furthermore, Defendant contends the trial court erred in permitting the jury to consider the victim's classification as a "peace officer" pursuant to 42 Pa. Cons. Stat. Ann. §9711 (d)(1) (Purdon 1980). We do not agree.

Defendant agrees that the victim, a private security guard, was appointed by the Court as a night watchman as defined by Pa. Stat. Ann. tit. 53 §3704 (Purdon 1895). The statute reads as follows:

> It shall be lawful for any number of persons owning or occupying real estate in any city, borough or township of this commonwealth, upon application to and with the approval of the court of quarter sessions of the proper county, to employ a night watchman or night watchmen for the purpose of protecting their premises and property in the night-time and all persons so appointed, with the approval aforesaid, as night watchman shall have, exercise and enjoy all the rights, powers and privileges, now vested by law in constables or police officers duly elected or appointed in

said cities or boroughs. (Emphasis added).

The operative words in the statute applicable to the instant case are "night watchman shall have, exercise and enjoy all the rights, powers and privileges, now vested by law in constables or police officers." Clearly, a security guard duly appointed as a night watchman, enjoying the rights[,] powers, and privileges of a police officer, falls within the purview of 42 Pa. Cons. Stat. Ann. §9711 (d)(1) (Purdon 1980) which states that the killing of a peace officer in the performance of his duties is an aggravated circumstance. Analogous to the case at bar, in Commonwealth v. Beasley, 504 Pa. 485, 475 A.2d 730 (1984), one of the aggravating circumstances found by the jury was that the victim was a peace officer who was killed in the performance of his duties. Clearly, the night watchman in the instant case is properly classified as

a peace officer invoking the provisions set forth in Pa. Stat. Ann. tit. 53 §3704 (Purdon 1895) and thus, the Court's application of 42 Pa. Cons. Stat. Ann. §9711 (d)(1) (Purdon 1980) is correct.

Defendant further contends that the victim was not killed in the performance of his duty. Apparently, Defendant espouses this dubious assertion because the victim was not shot while making rounds, investigating a suspicious situation, apprehending a suspect or otherwise performing his duties, but rather the victim had been watching television. "If a police officer were sitting in his patrol car on a coffee break and someone came up and shot him, would it be said that he was not engaged in the performance of this [sic] duties? Certainly not. The victim in this case was on duty during his regular shift, and, in fact, had just come in from a patrol." (N.T. Tiral [sic], p. 20-21). Certainly then,

the victim was performing his duty as a peace officer. Furthermore, the victim was in uniform while on duty in the guard house of the Hemlock Farms Security Office. The testimony of various witnesses indicated that Defendant was fully aware that the victim was a security guard and would be on duty on the evening in question. In fact, the Defendant went to the victim's place of duty to perform the murder. Thus, we believe that there was not error in permitting the jury to consider this factor as an aggravating circumstance.

Finally, the Defendant contends that the charges of criminal homicide of George Mehle and criminal attempt to commit homicide of George Mehle merge and that the charges of criminal homicide and aggravated assault of Wayne Burke merge. This contention is not properly before the court for determination of Defendant's Motion for a New Trial and for Arrest of Judgment. Such

determination shall be considered at the final sentencing of the Defendant.

For the aforementioned reasons, we believe that the Defendant's contentions do not warrant a new trial. Because a new trial is not warranted in the instant case, we shall not consider Defendant's Motion in Arrest of Judgment.

O R D E R

AND NOW, this 24th day of June, 1986, the Defendant's Motion for a New Trial and/or Arrest of Judgment is HEREBY DENIED. Defendant is ordered to report for sentencing on July 17, 1986, at 1:30 P.M.

BY THE COURT:

/s/ Harold A. Thomson, Jr.
P.J.

cc: Michael E. Weinstein, Esq. - for Commonwealth
Douglas J. Jacobs, Esq. - for Defendant
Probation Department
Sidney L. Krawitz, Esq. - Pa D&C

IN THE COURT OF COMMON PLEAS
OF PIKE COUNTY, PENNSYLVANIA
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA	:	NO. 89-1984
v.	:	
BARRY GIBBS, Defendant	:	

OPINION AND ORDER

This matter is before the court on Defendant/Petitioner's Brief in Support of Motion to Modify and/or Reconsider Sentence. The issue to be decided is whether the death sentence imposed by this court should be vacated or modified and a life sentence imposed.

I. FACTS

Defendant Barry Gibbs was sentenced by this court on July 17, 1986, based upon a jury's sentencing hearing finding that Gibbs should be sentenced to death. Pursuant to 42 Pa.C.S.A. §9711, this court sentenced the Defendant to death and to two (2)

consecutive jail terms on related charges. The Defendant now files this Motion to Modify Sentence.

II. DISCUSSION

After a careful reading of the sentencing hearing record, we find that the jury acted properly in their imposition of the death sentence. The Defendant is correct in its reference to Commonwealth v. Holcomb, 508 Pa. 425, 498 A.2d 833, 856 (1985), for the balancing test to be used by a jury in sentencing a person to death. The jury balances the precisely defined aggravated circumstances against the extensively allowed mitigating circumstances before imposing the death penalty, according to Holcomb.

It is also true that 42 Pa.C.S.A. §9711, et seq., is very specific as to the aggravated circumstances to be weighed and its broadness as to mitigating circumstances.

But as in Holcomb, the consideration of aggravating circumstances by the jury in their sentencing deliberation, outside of those enumerated in the statute, does not require that a death sentence be vacated or modified.

A review of the record shows that the jury instructions as to the sentencing guidelines were proper. This fact is not disputed. The jury had the duty to use the balancing test explained to them in the instructions and arrive at a decision based on those instructions. The fact that they chose to consider other factors is beyond our control. The United States Supreme Court has recognized the fact that there is no perfect sentencing system, Lockett v. Ohio, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978); as has the Supreme court of this Commonwealth, Commonwealth v. Zettlemoyer, 500 Pa. 16, 57, 454 A.2d 937, 969 (1982).

We feel that it was possible for the jury balancing aggravating circumstances, (excluding the two mentioned by the jury and not enumerated in 42 Pa.C.S.A. §9711 (d)) against the mitigating circumstances could have found that the death penalty was warranted in this case.

O R D E R

AND NOW, this 4th day of November, 1986, Defendant's Motion to Modify and/or Reconsider Sentence is denied for the aforementioned reasons.

BY THE COURT,

/s/ Harold A. Thomson, Jr.
P.J.

cc: District Attorney
Ronald M. Bugaj, Esq. - for Defendant
Sidney L. Krawitz, Esq. - Pa D&C